



October 18, 2021

VIA ELECTRONIC SUBMISSION

Ann E. Misback, Secretary
Board of Governors of the Federal
Reserve System
20th Street and Constitution Avenue,
NW
Washington, D.C. 20551
Docket No. OP-1752

James P. Sheesley, Assistant Executive
Secretary
Attention: Comments-RIN 3064-ZA26
Legal ESS
Federal Deposit Insurance Corporation
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Washington, D.C. 20429
FDIC RIN 3064-ZA26

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street, SW, Suite 3E-218
Washington, D.C. 20219
Docket ID OCC-2021-0011

Re: Proposed Interagency Guidance on Third-Party Relationships: Risk Management

Ladies and Gentleman:

The Financial Services Forum (the "Forum")¹ appreciates the opportunity to submit this letter to the Board of Governors of the Federal Reserve System (the "FRB"), the Federal Deposit Insurance Corporation (the "FDIC") and the Office of the Comptroller of the Currency (the "OCC") and, collectively with the FRB and the FDIC, the "Agencies") on the proposed interagency guidance (the "Proposal") on managing risks associated with third-party relationships. The Proposal would be

¹ The Financial Services Forum is an economic policy and advocacy organization whose members are the chief executive officers of the eight largest and most diversified financial institutions headquartered in the United States. Forum member institutions are a leading source of lending and investment in the United States and serve millions of consumers, businesses, investors, and communities throughout the country. The Forum promotes policies that support savings and investment, deep and liquid capital markets, a competitive global marketplace and a sound financial system.

applicable to each of our member institutions, the eight U.S. global systemically important bank holding companies.

At the outset, we wish to highlight that we welcome the Proposal, subject to certain changes discussed further below, and the interagency nature of the guidance, for a number of reasons. As noted in the preamble to the Proposal, each of the Agencies has issued distinct third-party risk management guidance at different times.² We support the Agencies' desire "to promote consistency in their third-party risk management guidance" across all banking organizations³ and would support the Agencies advocating for their risk-based framework to be reflected in any international standards that are set by international standard setting bodies, such as, for example, the Financial Stability Board or the Basel Committee on Banking Supervision. We also applaud the Agencies for updating and modernizing the existing guidance to respond to increased "[c]ompetition, advances in technology, and innovation in the banking industry."⁴

Given that the Proposal is based on the OCC's existing third-party risk management guidance from 2013 and also includes the OCC's 2020 FAQs,⁵ the Forum member institutions are familiar with and have been managing to these expectations. Indeed, even those member institutions that do not have OCC-supervised subsidiaries manage to OCC guidance as a best practice. As such, we wanted to use this opportunity to provide comments based on our experience implementing the OCC's 2013 guidance and 2020 FAQs.

As discussed further below, this comment letter sets out two key overarching perspectives from the Forum member institutions.

- First, we welcome and support the risk-based framework for overseeing and managing third-party relationships set out in the Proposal, which would allow for flexibility in how banking organizations implement their risk management processes. Such flexibility enables firms to tailor the treatment of third-party relationships based on the level of risk, complexity and the nature of the third-party relationship.
- Second, we encourage the Agencies to consider establishing an oversight approach for certain systemically important third-party service providers

² Proposed Interagency Guidance on Third-Party Relationships: Risk Management, 86 Fed. Reg. 38182, 38184 (Jul. 19, 2021).

³ *Id.*

⁴ *Id.*

⁵ As outlined further in Section 3 below, we would not recommend that the Agencies include all of the OCC's 2020 FAQs in the final guidance. Please refer to the comment letters submitted by the Bank Policy Institute ("BPI") and Securities Industry and Financial Markets Association ("SIFMA") for further detail on our specific recommendation.

using their existing authority. While third-party service providers will be subject to this guidance by virtue of their engagement with financial institutions, there are limitations to this indirect model of regulation. Accordingly, we request that the Agencies provide additional guidance or take other measures to assist in the oversight of certain systemically important third-party service providers that sit outside of the financial services ecosystem.

In addition to these perspectives, regarding specific adjustments to the Proposal, we support certain recommendations that are explained in further detail in comment letters submitted by BPI and SIFMA as outlined in Section 3 below.

1. We support the principles and risk-based framework outlined in the Proposal and believe this framework should be retained in the final guidance.

We support the Agencies' use of risk-based principles to clarify supervisory expectations for the risk management of third-party relationships, enabling banking organizations to tailor their risk management practices in a safe and sound manner. The Agencies explain that the Proposal would allow banking organizations to develop practices based on the level of risk and complexity of the third-party relationship and "is intended to provide principles that are useful for a banking organization of any size or complexity."⁶

Accordingly, the proposed risk-based framework would allow each banking organization to develop its own third-party risk management practices that reflect the nature of its business and operations, its resources and the risks posed by the third-party relationship. In particular, the Proposal would allow a banking organization to scale the comprehensiveness and rigor of its oversight and third-party risk management practices based on the risks posed by the particular third-party relationship—i.e., third-party relationships that present the most risk to the banking organization would be subject to more comprehensive and rigorous due diligence, contract negotiation and ongoing monitoring than third-party relationships that pose less risk. Although we support narrowing the scope of the Proposal in certain respects, such as by narrowing the types of third parties that would be covered,⁷ even in the absence of such narrowing, we welcome the flexibility provided by the Proposal's principles and risk-based framework.

⁶ 86 Fed. Reg. at 38185. This risk-based approach is particularly important given that guidance will apply to depository institutions and nonbank subsidiaries.

⁷ See Letter from BPI, Comment on Proposed Interagency Guidance on Third-Party Relationships: Risk Management (Oct. 18, 2021) and Letter from SIFMA, Comment on Proposed Interagency Guidance on Third-Party Relationships: Risk Management (Oct. 4, 2021).

The following points provide additional support for the Proposal’s risk-based framework.

- First, the Proposal would apply to relationships where a banking organization partners with a financial technology (“fintech”) company.⁸ The Agencies have highlighted the risks associated with rent-a-charter models where a small or mid-sized bank outsources its deposit or loan platform to a fintech company.⁹ Under a risk-based framework, banking organizations would be able to tailor their third-party risk management program to address the unique risks presented by fintech arrangements, such as reputational risk to the banking organization, risk to customers of the banking organization and the fintech company, and potential financial risks to the banking organization if the fintech company were to fail to meet the banking organization’s expectations, among others.¹⁰ In particular, a banking organization with a robust risk management program to address fintech partnerships may pose less risk than a comparable arrangement with a banking organization with fewer established controls. In this regard, we support inclusion of the OCC’s FAQ 10 in the final guidance, which provides that “[a] bank’s relationships with a fintech company may or may not involve critical bank activities, depending on a number of factors,”¹¹ as it acknowledges subjecting fintech companies to the same principles and risk-based framework as other third-party arrangements.¹²

⁸ See 86 Fed. Reg. at 38186, 38199 (noting that third-party relationships may include relationships with fintech companies and discussing the considerations for when a third-party relationship with a fintech company would be considered a critical activity).

⁹ See, e.g., Agencies, Conducting Due Diligence on Financial Technology Companies: A Guide for Community Banks, at 1 (Aug. 2021), <https://www.federalreserve.gov/publications/files/conducting-due-diligence-on-financial-technology-firms-202108.pdf> (stating that the Agencies recognize that arrangements between fintech companies and community-sized banks can “introduce risks”); see also Joseph Caputo and Lee Reiners, The FinReg Blog, The Risk of Rent-A-Charter: Examining New Risks Behind Bank-Fintech Partnerships (Jan. 23, 2020), <https://sites.law.duke.edu/finregblog/2020/01/23/the-rise-of-rent-a-charter-examining-new-risks-behind-bank-fintech-partnerships/> (noting that banks that partner with nonbank fintech lenders “allow their fintech partners to forgo the rigorous process of becoming a bank or complying with multiple states’ licensing requirements and usury laws” and outlining the legal and regulatory risks such partnerships present).

¹⁰ See 86 Fed. Reg. at 38187 (noting that third parties “may introduce new risks or increase existing risks, such as operational, compliance, reputation, strategic, and credit risks and the interrelationship of these risks”).

¹¹ 86 Fed. Reg. at 38199.

¹² See Section 3 below regarding our recommendation to generally align the definition of “critical activity” more closely with existing definitions.

- Second, the Proposal would enable large banking organizations to oversee and manage their outsourcing and other service relationships with domestic and foreign affiliates in a manner that is consistent with each firm’s unique organizational structure.¹³ In this regard, we support the inclusion of the OCC’s FAQ 6 in the final guidance, which provides that “[t]here is no one way for banks to structure their third-party risk management process” and discusses both dispersed and central accountability for a banking organization’s third-party risk management processes.¹⁴ This approach will support banking organizations in managing the risks posed by inter-affiliate service providers in a manner that is most efficient, effective and well-suited to the organizational and governance structure of the firm.

In addition, a risk and principles-based framework allows banking organizations to focus on those arrangements that present the most material risk. The use of rigid and prescriptive rules can divert resources to arrangements that present less risk and may ultimately contribute to an inefficient “tick the box” risk management exercise.

2. The Agencies should use existing authority to establish an approach for overseeing certain systemically important third-party service providers.

Although third-party service providers will be subject to this guidance by virtue of their engagement with financial institutions, there are limits to this indirect model of regulation. Accordingly, we recommend that the Agencies consider how certain systemically important third-party service providers that sit outside of the financial services eco-system should be overseen more directly.

a. Current Challenges

Banking organizations are only one part of the financial services eco-system, and some systemically important third parties that sit outside the banking eco-system play a significantly larger role than a banking organization is able to oversee on its own. Specifically, each banking organization is only able to diligence and negotiate with a systemically important third party with respect to the scope of the services being provided to it, but these third parties provide a wide array of services to numerous parties that would not be visible to the contracting banking organization.

Banking organizations currently utilize the existing third-party risk management guidance and will employ the principles outlined in the final guidance. However, systemically important third parties present challenges that banking organizations are not able to address on their own.

¹³ See *id.* at 38185 (“While determinations of business arrangements may vary depending on the facts and circumstances...examples of third-party relationships [include]...services provided by affiliates and subsidiaries”).

¹⁴ *Id.* at 38198.

One such challenge is that banking organizations may not be able to fully diligence or negotiate with a systemically important third party in the manner outlined in the Proposal. In this regard, we appreciate the Agencies' recognition that, in some circumstances, banking organizations may have difficulty conducting fulsome due diligence or negotiating changes to standard services contracts.¹⁵ This issue is also acknowledged in the OCC's FAQ 5,¹⁶ which addresses situations where third parties are unwilling to provide the information a banking organization needs to complete its due diligence or are unwilling to negotiate provisions in services contracts. The Forum's member institutions, despite being the largest U.S. bank holding companies, are far from immune to these challenges.

To address this challenge, we appreciate the Agencies' efforts to identify ways for banking organizations to support each other's third-party risk management in such circumstances by, for example, information sharing.¹⁷ Although the Proposal notes that "banking organizations may collaborate when they use the same third party,"¹⁸ in practice it is difficult for banking organizations to do so, due to antitrust concerns and general competitive concerns. Even when banking organizations are able to collaborate, such collaboration is limited to the services being provided.

Due to the challenges noted above, banking organizations may not have insight into the full scope of the risks a systemically important third party presents, both to the banking organizations themselves and the broader financial system, resulting in gaps in risk management. The Agencies could help to address such gaps by developing a regulatory regime for these third parties. As an example, many banking organizations contract with cloud computing service providers. Alongside issues in relation to negotiating power, because such providers are not subject to financial regulatory oversight and are not required to provide any sort of reporting regarding their activities, banking organizations are further limited in their ability to identify, manage and monitor the risks such provider presents to the banking organization and the financial system. Indeed, a banking organization is only aware of the risks related to the specific services being provided to such organization. By contrast, financial market utilities ("FMUs") may be regulated by the FRB, the Securities and Exchange Commission and Commodities Futures Trading Commission, including being subject to examinations and enforcement actions, under Title VIII of the Dodd-

¹⁵ See, e.g., 86 Fed. Reg. at 38191 (noting that there may be "situations where it is difficult for a banking organization to negotiate contract terms" and outlining determining factors for whether the banking organization should enter into a relationship with such party).

¹⁶ *Id.* at 38198.

¹⁷ See *id.* at 38185-86 ("Collaboration can also result in increased negotiating power and lower costs to banking organizations not only during contract negotiations but also for ongoing monitoring.").

¹⁸ *Id.* at 38185-86.

Frank Wall Street Reform and Consumer Protection Act of 2010.¹⁹ As a result of this oversight and related requirements, banking organizations and regulators now have greater insight into the full scope of risks FMUs could present as counterparties.

b. Recommendations

The Agencies have the authority to issue separate guidance or otherwise oversee systemically important third-party service providers to support and assist banking organizations in complying with the Proposal. Specifically, the Proposal acknowledges that “[w]hen circumstances warrant, the Agencies may use their authorities to examine the functions or operations performed by a third party on the banking organization’s behalf.”²⁰ In addition, pursuant to the Federal Financial Institutions Examination Council’s (“FFIEC”) IT Examination Handbook, as part of the examination process, the Agencies have the ability to identify and select technology service providers that “[warrant] interagency supervision and the development of a risk-based supervisory strategy for each of these entities” and to examine such service providers.²¹ Additionally, pursuant to the Bank Service Company Act, the performance of certain services “by contract or otherwise” are subject to “regulation and examination” by the appropriate federal banking agency “to the same extent as if such services were being performed by the depository institution itself on its own premises.”²²

To address the risks such third parties pose to banking organizations and the financial system, we respectfully request that the Agencies consider using their existing authority to take one or more of the following actions:

- Issue separate guidance applicable to systemically important third-party service providers. Such guidance could include, among other items, requirements for providing information and reporting, for protection of customer information and licensing requirements, to align with the Agencies’

¹⁹ See FRB, Designated Financial Market Utilities, Title VIII to the Dodd-Frank Act (Jan. 29, 2015), <https://www.federalreserve.gov/paymentsystems/title-viii-dfa.htm>.

²⁰ See 86 Fed. Reg. at 38195.

²¹ FFIEC, IT Examination Handbook, Supervision of Technology Service Providers, Risk-Based Supervision, <https://ithandbook.ffiec.gov/it-booklets/supervision-of-technology-service-providers/risk-based-supervision.aspx>.

²² 12 U.S.C. § 1867(c)(1); see also FDIC, Required Notification for Compliance with the Bank Service Company Act, FIL-49-99 (Jun. 3, 1999) (reminding FDIC-supervised institutions to provide notice as required by Section 7(c)(2) of the Bank Service Company Act for the performance of certain services and stating “[a]s defined in Section 3 of the Act, these services include ‘check and deposit sorting and posting, computation and posting of interest and other credits and charges, preparation and mailing of checks, statements, notices, and similar items, or any other clerical, bookkeeping, accounting, statistical, or similar functions performed for a depository institution.’”).

expectations for diligence, contract terms and ongoing monitoring of third-party relationships.

- Require standardized information from certain systemically important third-party service providers that would support banking organizations' diligence, ongoing monitoring and contract terms.
- Conduct more onsite examinations and/or audits of certain systemically important third-party providers and share any anonymized or otherwise appropriately redacted insights with banking organizations. For example, although some service providers are already subject to examination by the Consumer Financial Protection Bureau and the FFIEC, banking organizations have no insight into the information contained in those examination reports.
- Use their convening power to facilitate information sharing to help identify common risks that may impact the integrity of the financial system.

3. **The Agencies should consider implementing recommendations made in comment letters submitted by BPI and SIFMA.**

We generally support the comment letters being submitted by BPI and SIFMA. We specifically wish to emphasize the importance of the following recommendations made in those letters:

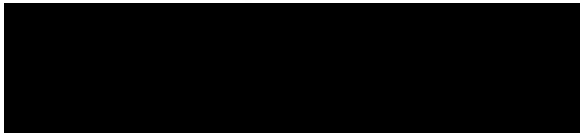
- We support the recommendations to narrow the scope of the definition of "business arrangement" and to align the definition of "critical activity" with existing regulatory definitions.
- We agree with the recommendation that boards of directors should have flexibility in how they oversee third-party risk management, consistent with the FRB's recent board effectiveness guidance and a less prescriptive approach overall to third-party risk management.
- We support the recommendation to update the treatment of relationships with data aggregators and information technology vendors and to keep screen-scraping activities outside the scope of the final guidance.
- We agree with the recommendations regarding incorporation of the OCC's 2020 FAQs into the final guidance.
- We agree with the recommendation that the final guidance clarify that a banking organization would not be expected to perform due diligence on "fourth" parties (unless there is a direct relationship with the subcontractor), due to the banking organization's lack of contractual rights and limited authority over such subcontractors.

- We support the recommendation that the Agencies update the FFIEC's Information Technology Handbook to reflect this Proposal.

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Thank you for considering these comments. Please feel free to contact the undersigned (KFromer@fsforum.com) with any questions.

Respectfully submitted,



Kevin Fromer
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The Financial Services Forum